case that we have examined where that theory was involved.

It is not right that Mr. Mobley, who was admittedly totally and permanently disabled for life and incapable of doing anything for profit should have his rights to damages cut off by the erroneous instructions given by the trial court in this case. The United States Court of Appeals in our opinion should have reversed and remanded this case for a new trial to the end that justice might be done. And so Petitioners respectfully pray that this Court issue its writ of certiorari to the end that the judgment of the trial court and that of the United States Court of Appeals may be reversed, and they further pray for general relief.

Respectfully submitted,

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**IN THE SUPREME COURT OF THE UNITED STATES.**
***October Term, 1950.***

**No. _____**

**LEON MOBLEY AND ASSOCIATED INDEMNITY CORPORATION, *Petitioners,***

***vs.***

**BETHLEHEM SUPPLY COMPANY, *Respondent.***

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

Respondent desires to file this brief in opposition to the Petition for a Writ of Certiorari by means of which the decision of the Court of Appeals for the Fifth Circuit would be reviewed. The purpose of this brief is to expose the absolute lack of merit to petitioners' application to be the beneficiary of the court's discretion.

Respondent states:

POINT I: *The statements of fact in the petition and brief, in most instances, are not accurately stated and tend to give the court a warped view of the evidence considered by the jury and in the record before the Court of Appeals.*

POINT II: *The issues involved in the case are not of the gravity and public importance that justify the court to*

*exercise the carefully limited discretionary power to grant writs of certiorari.*

POINT III: *The specifications of error of law charged against the Court of Appeals are without basis.*

I.

**The statements of fact in the petition and brief, in most instances, are not accurately stated and tend to give the court a warped view of the evidence considered by the jury and in the record before the Court of Appeals.**

The court may well wonder upon the initial consideration of petitioner's petition and brief how the jury came to a verdict against petitioner, and more so, how a competent trial judge and an experienced Court of Appeals gave approval thereto. The bare recital of the evidence by petitioner gives the impression that a grave injustice has been done in a case of great public importance, when no such thing is true.

Petitioner was employed by Western Drilling Company, hereafter called Western, as a derrick floorman. Western was erecting and putting into operation, for the first time, a new drilling rig purchased of respondent. On the day involved, petitioner came on duty at 4:00 P. M. At that time the persons present were: (*1*) The day crew whose tour of duty had ended, none of whom were present when respondent was injured at 4:15, and none of whom are identified except the driller whose name was Bob; (*2*) Mr. Brieth, a sales engineer representative of Bethlehem; (*3*) Mr. Henderson, one of the owners of Western; (*4*) petitioner and the other members of his crew, who will be identified in the subsequent recital of the evidence, and (*5*) a Mr. McCain, an independent contractor, who was under

the derrick floor and whose presence was unkown to most of the witnesses.

The driller, Bob, and the driller on petitioner's shift, Mr. Williford, had a conference and informed Mr. Brieth that the low clutch on the drum was hard to engage, and Mr. Brieth suggested greasing the mechanism that operated the clutch.

Mr. Brieth was there as the representative of respondent (R. 147) "to give whatever advice or help in the way of seeing that the machinery gets started properly." He had gone there at the direction of his immediate superior, and under the orders of respondent, by whom he was paid. He (R. 168) "gave whatever advice was possible to the men that were rigging up this equipment, as to the proper location of the transmission half of the drawworks, half of the drawworks, and assisted them in lining up the center of the wheel with the center of the drawworks, showing them the center line of the drawworks so their truck drivers and so forth could properly align it, and instructed the drillers in the mechanical motions of the gear shifts, levers, and so forth."

Q. "Your attention was directed towards the machinery which was a product of your employer manufacturer?

A. Yes, sir.

Q. And to explain such things as might be information requested from one who had by study become familiar with that operation?

A. Yes, sir."

He said (R. 171):

Q. "Who did that operation and spotted that fitting?

A. Mr. Williford. I do not do any mechanical operation on any rig, or did not at the time I was employed."

He gave answers to the following questions (R. 192):

Q. "And you, as an expert, had gone out there to show them how to put it up and put it into operations properly, that is what you were doing, isn't it?

A. Yes, sir.

Q. And whatever was necessary to that end you did, didn't you?

A. As long as it was advice or constructional nature, yes, sir.

Q. Are you trying to claim you didn't have any right to touch anything around there; is that what you are trying to tell this jury?

A. Not necessarily, sir.

Q. All right, you had a right to test that machine out, didn't you, as an expert?

A. Yes, sir.

Q. And you did it, didn't you?

A. No, sir, I don't believe I could say truthfully that I did.

Q. Didn't you tell the jury here on direct examination that you had been jiggling that stuff before Mr. Mobley went in the drawworks to grease this thing?

A. The drillers and myself had checked the low jaw clutch lever, yes, sir, but not testing the rig.

Q. You said you did it?

A. Yes, sir."

We have set out this evidence, which is all of the evidence in the record on the point of his authority and his acts in operating the controls, to offset certain unwarranted statements of fact in petitioner's petition and brief, and to give this court a complete picture on those matters.

The drum or spool on which the wire drilling line was wound and unwound was covered by a partly rounded metal

covering, and in the upper front aspect thereof there was a rectangular opening about 18 to 24 inches from top to bottom and about 5 feet across (R. 200). The wire drilling line passed through this as it was let out or wound onto the spool. As one stood on the derrick floor facing this drum cover, one could observe another much smaller opening, covered by a movable plate, to the left of the larger opening called the inspection plate (R. 200), and to the left of the drum cover was the driller's position at the controls (R. 200).

The controls consisted of (*1*) three foot-operated pedals standing about 4 inches above the floor, extending in a row vertically to the drum cover, (*2*) a large brake lever about 40 inches long, which arose from the floor and customarily stood above the pedals at an angle of about 45 degrees, on which the driller (when in position) rested his right hand, and (*3*) a master clutch to the driller's left, about shoulder high, on which the driller (when in position) rested his left hand. The engines that furnished the power were running but, with the master clutch disengaged (the driller disengages it by pulling it outward or toward him and engages it gradually, like the clutch of an automobile, by pushing it inward) were idling. In order for anyone to engage the engines with the drilling works two distinct operations with the controls, in proper order, were needed: The low drum clutch must be engaged by pressing down the proper foot pedal and then the master clutch must be engaged, as above indicated. As one faced the drum cover, the driller's position was to the left of the controls or, in effect, the controls (especially the brake lever) were between the driller and the drum cover. (R. 84)

Mr. Williford, the driller, Mr. Brieth and Mr. Mobley

stood facing the drum cover, from left to right in the order named, when Mr. Brieth suggested greasing the low drum clutch sliding member. On the left end of the drum or spool is a brake flange several inches high (R. 197), and to the left of the flange near the end of the shaft of the spool was the grease connection or nipple through which the grease was to be applied (R. 203). Mr. Williford gave the order to Mr. Mobley to apply grease, first assuming the driller's position and engaging the power to turn the drum and spot the nipple for convenience, and left the scene to do work at another place on the derrick floor. Mr. Williford was the last person to touch the controls before Mr. Mobley was hurt. Mr. Williford testified he disengaged the power after spotting the nipple. Mr. Mobley warned the other two men to not touch the controls while he was inside the drum cover. Mr. Mobley went through the big opening in the drum cover, sat astride the spool (R. 82), faced left, reached over the brake flange to connect the grease gun to the nipple (which he could not see because of the brake flange), and made two strokes of the grease gun. Immediately, the drilling works began to operate and the drum to revolve, the result of which was to inflict injury upon Mr. Mobley.

Mr. Brieth testified, and demonstrated by photos taken in connection with his deposition later (R. 205-206), how he stepped upon the ledge or base of the drum cover and watched Mr. Mobley attach his grease gun and apply the grease. Mr. Brieth was peering through the inspection plate hole and could see no part of Mr. Mobley's body except his hands.

Mr. Mobley filed his common law action against Bethlehem as the master of Mr. Brieth, as is authorized by the

Texas law, to recover damages for his injuries, although he was entitled to and had received compensation from his employer through an insurance carrier by virtue of the Workmen's Compensation Law of Texas. He alleged that Mr. Brieth got into the driller's position and manipulated the controls, thus engaging the power and caused his injury. Mr. Brieth positively denied this allegation.

On the derrick floor at 4:15 P. M., the time of the accident, besides Mr. Brieth, were Mr. Henderson, Mr. Mobley's employer, and four of his crew members. Mr. Henderson did not testify at the trial, neither did Patterson, a crew member. The driller and two crew members (one a brother-in-law of Mr. Mobley) testified and each denied seeing Mr. Brieth manipulate the controls prior to Mr. Mobley's injury. (R. 124, Mr. Williford; R. 130, Mr. Sisson; R. 143-144, Mr. Maxey.) Mr. Mobley testified he could not see Mr. Brieth after he went inside the drum cover and did not hear any movement until the machinery started, and he did not know who engaged the low gear clutch (R. 62).

Therefore, plaintiff offered no eye witness to Mr. Brieth's alleged act.

Plaintiff offered the testimony of Mr. McCain, the man under the derrick floor, and Mr. Williford, the driller, to the effect that immediately after the accident Mr. Brieth stated to each of them separately that he did manipulate the controls and engage the power and cause Mr. Mobley's injury. Mr. Brieth denied making these statemnts.

Respondent used Mr. Brieth as its only witness, and we have outlined the effect of his testimony above which was a complete and positive denial of the acts and statements charged to him.

The jury returned a verdict for respondent, concurred in by all members.

Petitioner's statement on page 3 of his petition, "* * * defendant's employee, Brieth, engaged the clutch which resulted in plaintiff receiving injuries * * *" is not correct, was not supported by any direct evidence at the trial and the circumstantial evidence in the nature of confessions offered to prove the allegation was disbelieved by the jury. Therefore, petitioner is not at all warranted to make such a statement.

In another respect, petitioner is not correctly stating the record to the court in his petition or in his brief. In the summary statement of matters involved and in the argument in support of Specification of Error No. 1, petitioner repeatedly says there was no evidence of a mechanical defect in the drilling rig or unit. This is based entirely on the testimony of Mr. Brieth (R. 189), in answer to misleading questions relating to his deposition, to the effect that "there was nothing mechanically wrong with the machine." Reference to R. 148, where petitioner introduced in evidence certain portions of Mr. Brieth's deposition, will show that Mr. Brieth really said, in answer to a question as to whether anything was mechanically wrong with the machine: "The only thing we could find was the low clutch was hard to operate, and mechanically—the mechanical operation of it wasn't faulty. It was all right. But that was hard to operate." All of the witnesses who testified on the subject said the low drum clutch was hard to operate for some unknown reason, and Mr. Brieth's suggestion that it be greased was an experimental step designed to hunt the reason for this. When it is then considered that the machinery started operating without any stated cause the plaintiff could prove, the jury may have believed there was

a mechanical defect unknown to anyone or for a lack of grease. It is not proper for petitioner to say, on pages 9, 15, 18 and 19, that there was no evidence on this point, or that it was undisputed in his favor, or that the undisputed evidence was that there was no defect. Respondent is by this means trying to make a distinction between a "mechanical defect" and the "clutch not functioning properly." The two statements mean the same thing to us and to the jury. Respondent says on page 23 that undisputed evidence shows the clutch was not functioning properly. Yet elsewhere it is insisted that the undisputed evidence showed "no mechanical defect."

Petitioner is subject to the same criticism on another fact issue. Petitioner says, on pages 9, 20, 21 and twice on page 23, that Mr. Brieth was sent by Bethlehem to manipulate these controls, or that the undisputed evidence is that he had such authority, or that there was no evidence to the contrary, and in particular, "We have pointed to the testimony in the record that what Bethlehem had Brieth employed to do was to manipulate and operate the draw works among other things, test it so to speak, to the end that it would be set up so as to operate properly," and "The undisputed record shows that the clutch was not functioning properly (we interrupt here to point out that earlier petitioner has been asserting that the undisputed evidence was to the contrary) and Brieth himself was attempting to correct this thing; that was certainly not mere personal curiosity on his part but was for the purpose of carrying out the business of the defendant and in the discharge of his duty to his employer." The bold assertions that he had authority, or was sent to manipulate the controls, etc., are not justified by the evidence. Here is Mr. Brieth's testimony: (R. 147): "* * * as is the custom in the oil field, a

machinery man from the vendor usually goes out to give whatever advice or help in the way of seeing that the machinery gets started properly"; and again, R. 169, "As was the custom of the vendors a person in connection with the company, in the mechanical department, was sent out in an advisory capacity or assistance possible in the erection of new equipment"; and again, R. 168:

Q. "What work did you do, if any, in the interval between the day you first went out until January 31st?

A. I gave whatever advice was possible to the men that were rigging up this equipment, as to the proper location of the transmission half of the drawworks, half of the drawworks, and assisted them in lining up the center of the wheel with the center of the drawworks, showing them the center line of the drawworks so their truck drivers and so forth could properly align it, and instructed the drillers in the mechanical motions of the gear shifts, levers, and so forth.

Q. Your attention was directed towards the machinery which was a product of your employer manufacturer?

A. Yes, sir.

Q. And to explain such things as might be information requested from one who had by study become familiar with that operation?

A. Yes, sir,"

and again, R. 169 and 170,

A. "Low jaw clutch was hard to depress. I suggested we go up and look at it. We did. And the daylight driller made a funny remark, that if Williford had not been so slight he wouldn't have had any trouble pushing it down, in fact he never had any

trouble with it, he was a big man. We did jiggle this clutch and tried to engage it, and it was hard.

Q. During the jiggling who was present?

A. The two drillers and myself.

* * * * * * * *

Q. You mean the two drillers were there and you did manipulate or jiggle, as you call it, this low gear clutch to see if anything could be done about it, is that right?

A. Yes, sir";

and again, R. 171,

Q. "Who did that operation and spotted that fitting?

A. Mr. Williford. I do not do any mechanical operation on any rig, or did not at the time I was employed";

and again, R. 192,

Q. "And you, as an expert, had gone out there to show them how to put it up and put it into operation properly, and that is what you were doing, isn't it?

A. Yes, sir.

Q. And whatever was necessary to that end you did, didn't you?

A. As long as it was advice or constructional nature, yes, sir.

Q. Are you trying to claim you didn't have any right to touch anything around there; is that what you are trying to tell this jury?

A. Not necessarily, sir."

We think from this evidence the jury could determine the extent of Mr. Brieth's authority duties, and the petitioner's assertions regarding its unqualified support of his position is wholly unjustified.

We have labored this point to the detail before ex-

hibited because we fear the effects of a first impression gathered from a distorted presentation. We assume that the court has had more than a little experience in actual presentation falling far short of expectation aroused by promised presentation.

## II.

**The issues involved in the case are not of the gravity and public importance that justify the court to exercise the carefully limited discretionary power to grant writs of *certiorari*.**

The preceding remarks lead directly into a discussion of our second proposition. We were about to begin our discussion of this proposition by saying that this case is an average negligence case that might arise anywhere. However, we do not wish to accord it the high status of average. In the average case, the plaintiff will have some evidence to support his allegations of negligence charged to the defendant. Not so, this plaintiff.

Mr. Mobley had no eye witness to say that Mr. Brieth got into the driller's postion and manipulated the controls so as to engage the power and set the draw works in motion. He wished the jury to believe that (*1*) because the machinery would not become engaged and receive power and operate except through the direct act of some human, and (*2*) because Mr. Brieth was the human nearest the controls when the machinery set in operation, Mr. Brieth must be the one who engaged the power. That is all there is to plaintiff's lawsuit, except the unbelievable testimony of two witnesses that Mr. Brieth admitted to them he started the machinery. Really, the petitioner can have no just complaint because a jury would not give him a verdict on such evidence.

The issues of law were those that arise in hundreds of tort actions in Texas. Petitioner saw no great, or important, issues as is evidenced by the fact he requested no instructions to be given to define his position.

Perhaps the most distressing thing about this case is that prior to its belated filing, petitioner suffered grievous injuries. This makes the case of transcendent importance to him. But, without in anywise trying to minimize that aspect of the matter, courts deal with such matters daily, and the Honorable Courts below accorded to petitioner every lawful right and opportunity to make the best of a very weak case on the facts. Respondent was not at all to blame for petitioner's injuries. Respondent made no other defense of fact than that. The issue of liability or non-liability on evidence was for the jury. But, to go further and say that the issues were of such importance that this court should review the judgments of the lower courts as a point of importance to the public is not justified.

We will not burden the court with the citation of its decisions respecting its power to grant writs of certiorari nor of the discretion which rests in it with respect to granting such writs and other general pronouncements relating thereto. We will content ourselves with one citation which involves the discretion of granting or refusing such a writ to a Court of Appeals with respect to a decision involving local law issues arising in a negligence action between a servant and master. We call attention to *In re Woods*, 143 U. S. 202. In general, the court said there that the discretion vested in the Supreme Court of the United States to review decisions of Courts of Appeal by certiorari will only be exercised in matters of gravity and general importance. The court said further that issues of local

law, arising from the dismissal of an action by the servant against his master, is not of a character to call for the exercise of such discretion.

That is the rule which we think is applicable in this instance and we cite it for the purpose of authority in opposition to the exercise of the discretion in favor of petitioner in this instance.

III.

**The specifications of error of law charged against the Court of Appeals are without basis.**

We next desire to direct your attention briefly to the specifications of error and the arguments thereon contained in the brief in support of the petition for writ of certiorari.

Specification of Error No. 1 is as follows:

> "The error of the trial court in giving the jury the following instruction:
>
> > 'You are further instructed that if you find and believe from a fair preponderance of the evidence that the plaintiff received his injuries about which he now makes complaint, as a result of some mechanical defect in said drilling unit, or from the lack of grease on any part of said drilling unit, and not from the act of defendant or its plaintiff's injuries, or immediately prior thereto then in such event your verdict should be for the defendant'."

The authorities cited by petitioner in support of this contention are of the most general nature and consideration of the fact situations involved in those cases demonstrates that petitioner has gone no further than mere generalities in this respect.

A consideration of the evidence in the record will disclose that there was probably more direct and positive tes-

timony from the witnesses concerning the malfunctioning of the low drum clutch and the possible need for grease thereon than any other one thing in this record. While petitioner did not make the malfunctioning of this low drum clutch or the lack of grease thereon the basis for a charge of negligence against respondent in the trial court, nevertheless, everything that was done by any of the actors involved in this incident was done because of the malfunctioning of the low drum clutch and the lack of grease.

Petitioner could not base his cause of action in the trial court upon the alleged negligence of respondent in selling his master a drilling rig which would not function properly or which was not greased properly, nor could he base a charge of negligence against respondent on the rule of *res ipsa loquitur*. The evidence in the record will clearly show that this drilling rig had been sold to petitioner's employer some ninety (90) days earlier at a distant point in the State of Texas, had been hauled across the State of Texas by truck and had been stored in the open unused for the greater part of that time. For these reasons, basic elements to a charge of negligence against respondent in any respect of these points was lacking.

Nevertheless, because of the prominence in the course of the trial of the malfunctioning of the low drum clutch and the lack of grease, respondent felt that it was its privilege, both under state procedure and federal court procedure, to have the trial court, in defining the issues in the action, to clearly state to the jury that petitioner was not seeking to and could not recover from respondent because of the malfunctioning of the low drum clutch or the lack of grease. Therefore, respondent requested, and the trial court gave, the instruction complained of in the specification of error. See *Pleasant* v. *Fants*, 22 Wall. 116.

It is significant in considering the argument of petitioner on this point, that no reference is made in the argument to this language in the instruction "* * * or from the lack of grease on any part of said drilling unit, * * *." For some reason which is not clear to us, petitioner assumes that for the court to have given this instruction on the basis of "* * * some mechanical defect in said drilling unit, * * *" was unduly prejudicial to him, whereas the inclusion in the same instruction of a similar statement with respect to the lack of grease was not prejudicial to him. In our view of the matter, they were equal in effect since each was of equal prominence in the minds of all persons connected with the trial of the action. It is to be noticed throughout his brief that petitioner undertakes to contend that there was no evidence in the record of a mechanical defect in the drilling unit but the recital of the evidence by respondent earlier in this brief indicates that such a position was utterly without foundation. The witness, Mr. Brieth, clearly stated: "The only thing we could find wrong was the low clutch was hard to operate, and mechanically—the mechanical operation of it wasn't faulty. It was all right. But that was hard to operate." Petitioner does not argue that this evidence is not sufficient to have raised in the minds of the jurors some question concerning the mechanical state of the drilling rig nor is he willing to admit that the jurors may have concluded that the malfunctioning of this low drum clutch was a mechanical defect but on the contrary, petitioner places an interpretation upon this language that calls for the entire exclusion thereof through a contrary inference. But nowhere does he undertake to say there was no evidence about a lack of grease or the need for applying grease, or what happened as soon as grease was applied.

In the Court of Appeals, respondent analyzed the Texas cases cited, and, in addition, argued to the Court of Appeals on the basis of the decision of *Pleasant* v. *Fants,* 22 Wall. 116, that it was entirely proper for the trial court to have given such instruction for the purpose of precisely pointing out to the jurors what was not involved as a complement to the instructions advising the jurors what was involved. Petitioner does not pay proper respect to the decision of the Court of Appeals on this point when he says that the Court of Appeals "* * * brushed it aside, saying that it was justified and necessary to the end that the court confine the jury's consideration to the complaint made * * *." In our opinion, the trial court gave careful consideration to the propriety of giving such an instruction, and we respectfully urge that the Court of Appeals undoubtedly gave equally grave consideration to the propriety of the act of the trial court in giving such an instruction, and the reasons advanced by the Court of Appeals for approving the giving of such an instruction cannot be characterized as an act of brushing aside petitioner's charge that the giving of such instruction was erroneous.

Complaint is made regarding another ruling of the trial court, under Specification of Error No. 2.

> "The error of the trial court in giving the jury the following instruction:
>
> > 'Further, if you find and believe from a preponderance of the evidence that the operation of the draw works of the drilling unit involved was, at the time the plaintiff claims to have received his injuries, under the sole and exclusive charge of the Western Drilling Company and its representatives, and that defendant's representative Brieth had no authority from the defendant to manipulate

or operate said draw works, then in such events your verdict should be for the defendant'."

It really becomes difficult to answer in any reasonable fashion the arguments which petitioner advances in his brief because of the extreme and unjustified assertions which he continually makes respecting the facts in the record as the basis for his arguments.

We have illustrated heretofore, by quotations from the record, the nature and extent of Mr. Brieth's authority and duties and the manner in which he exercised them on this particular occasion. It can be seen that Mr. Brieth felt that there were limitations on his authority and that he felt that he remained strictly within the limitations placed upon him. In addition to this, the driller, Mr. Williford, testified (R. 125-126) that Mr. Brieth was supposed to have been in charge of the operations on this occasion and he, Mr. Williford, was taking orders from Mr. Brieth and that Mr. Brieth was actually above Mr. Henderson, the proprietor of the drilling company, who was present on the floor. Of course, there was a conflict of the testimony of Mr. Brieth and Mr. Williford in this respect. Respondent had pleaded in the alternatives, as is permissible under Texas procedure, that Mr. Brieth had been loaned by respondent to Western, or Western's employees had passed under the control of respondent by virtue of this custom in the oil fields testified to by Mr. Williford whereby the sales and service representative of the vendor is in complete charge of rigging up operations such as were being performed here, or if neither of these was strictly true, that the servants of respondent and Western were jointly so closely engaged in an endeavor for the mutual benefit of their respecive masters that, by force of law, the servants of each of the masters became the loaned servant of the other.

Therefore, the instruction above given was entirely justified by the evidence and by the contentions made on the part of petitioner with respect to the issue of whether respondent was liable for the acts of Mr. Brieth on this occasion.

The giving of this instruction was further justified in view of Mr. Brieth's testimony concerning the nature and extent of his authority and duties, for, if he had no authority or apparent authority to operate the controls or to manipulate or jiggle except upon request from the employees of Western and then only in the nature of giving advice or instructions, it is clear that respondent would not be liable for his acts in operating the controls or manipulating them or jiggling them for his own personal purposes, absent any request on the part of any employee of Western and in the face of the direct request of Mr. Mobley to stay away from the controls while he, Mr. Mobley, was inside the drum cover. It was entirely proper for the trial court to give this instruction for the purpose of giving the jury the limitations which exist at law upon the authority or apparent authority of an agent in any given situation.

Again we assert that petitioner is not treating the decision of the Court of Appeals with respect when it calls the reasoned judgment of that court on this point "astounding" and wholly without any support in the record.

The separation of these particular instructions from the instructions as a whole and the presentation of them to this court in an isolated fashion as a part of an attack which placed undue emphasis upon petitioner's view of the evidence, might at first blush cause this court to feel that an error had been committed with respect to some local law. But a study of this record as a whole with the

instructions considered as a group will demonstrate that there was no abuse of discretion on the part of the trial judge and that the decision of the Court of Appeals, reviewing the trial judge's discretion in the light of the record presented and the attacks made upon it, is correct.

We now take up Specification of Error No. 3 which is:

> "The error of the trial court in giving the jury the following instruction:
>
> > 'You are instructed that unless you find from a preponderance of the evidence that defendant's representative Brieth, while acting in the scope of his authority, negligently set in motion the drum of the draw works on the drilling unit involved, while plaintiff was inside the encasement thereof, in a place of danger, your verdict will be for the defendant'."

Respondent introduced evidence with respect to two of its charges of negligence, namely, (*1*) that Mr. Brieth negligently set the machinery in motion and (*2*) that Mr. Brieth failed to keep a proper lookout for Mr. Mobley.

The trial court instructed the jury (R. 217) that if it believed from a preponderance of the evidence that respondent's agent failed to keep a proper lookout for petitioner at the time and on the occasion in question, and that such failure was approximate cause of petitioner's injuries, that its verdict should be for petitioner. Since this was one of the grounds of negligence charged, the trial court deemed it proper to give the instruction along the lines indicated despite respondent's objection thereto (R. 225) on the ground that the overwhelming evidence, including Mr. Mobley's own testimony to the same effect, showed that Mr. Brieth actually had Mr. Mobley within his observation at

all of the times involved in this transaction and for this reason, Mr. Brieth could not have been guilty of failing to keep a proper lookout for Mr. Mobley. Likewise, as we pointed out to the Court of Appeals, the simple allegation that Mr. Brieth failed to keep a proper lookout for Mr. Mobley could not of itself have resulted in any injury to Mr. Mobley. Mr. Brieth had to be found guilty of setting the machinery in motion, whether he was keeping a lookout for Mr. Mobley or not, before Mr. Mobley could receive his injuries. Therefore, both phases of petitioner's charges of negligence were before the jury when the court also instructed the jury (R. 216) that if it found from the preponderance of the evidence that Mr. Brieth did engage the clutch and that such act was negligent, and that such act was further the approximate cause of the injuries sustained by petitioner, that its verdict should be for petitioner.

Since petitioner made two allegations of negligence and since the court gave separate instructions to the jury upon each allegation of negligence, it is difficult for us to see where petitioner has any basis for contending that it was confusing to the jury to give both instructions.

We observe (R. 223) that petitioner's counsel, in addressing the court with respect to the objections to the instructions given, states that the giving of the particular instruction under attack, in Specification No. 3, "* * * cuts out of any consideration from the jury the issue of failure to keep a proper lookout on the part of Mr. Brieth, * * *." Viewed in this aspect of the case, it is apparent that petitioner's objection to this instruction goes more to the form than to the substance. If it was petitioner's contention that the trial court should have coupled both allegations of negligence in one instruction, then this court is not being called

upon to do more than govern the trial courts on the form of the instructions given, and this, in turn, would require the trial courts to include every element involved in the instructions to the jury in the same instruction, and perhaps in the same paragraph and the same sentence. This would constantly confront the courts with the question of precedence in the giving of instructions relating to one allegation of negligence as contrasted with another. These are not matters of gravity or public importance.

Specifications of Error 4 and 5, read:

"The error of the trial court in holding that there was any evidence of probative force to support a verdict for defendant."

"The error of the trial court in failing to set the verdict of the jury aside on the ground that it was against the great weight and preponderance of the evidence and so opposed to substantial justice and so shocking to good conscience that the court ought not to permit it to stand."

The complaints urged under these two grounds are so obviously outside the scope of this court's consideration when it is confronted with a petition for a writ of certiorari, that we do not intend to discuss them. We have read the books in vain for a decision of this court saying that it would exercise its discretion to grant a writ of certiorari to bring before it for reversal a verdict of a jury based on conflicting evidence solely because it thought the verdict should have gone the other way. This Honorable Court does not allow that discretion to the Courts of Appeals or to itself. The jurors are the triers of the facts and on a record such as is before this court, there is no semblance of rea-

son for applying to this court for the exercise of such an extraordinary power.

Specification of Error No. 6 reads:

> "The error of the trial court in submitting to the jury the issue of unavoidable accident."

Respondent did not plead that petitioner received his injuries as a result of an unavoidable accident. But the lack of explanation of what set the machinery in operation, plus the conflict between the testimony of the witnesses on other material points, made the question of unavoidable accident proper. In any event, as respondent pointed out to the Court of Appeals, when one of the attorneys for petitioner, in addressing the jury, stated that instructions would undoubtedly be given upon unavoidable accident and made argument with respect thereto, respondent applied, in open court, for permission to amend its answer by interlineation to plead unavoidable accident. This was well within the discretion of the trial judge both by local law and federal procedure and if it should be held to be erroneous as not having been within the issues, then it was invited error on the part of petitioner's counsel and this court should certainly not be called upon to rectify such a trivial and invited error.

**Statute of Limitation.**

This issue was injected into the case in respondent's answer. According to the peculiar provisions of the Texas procedure, respondent was directed by the trial judge before the introduction of evidence, to make no reference to the fact that this was a compensation case in its origin, or that insurance was involved (although the insurance car-

rier for Mr. Mobley's employer was actually a party to the action) and, thereafter, the trial court declined to receive evidence touching the issue of statute of limitations and refused to instruct the jury thereon at respondent's request. Respondent cross appealed to the Court of Appeals on this point and the Court of Appeals, acting in conformity with its rule to not consider matters raised by cross appeals unless it had determined to reverse on the merits of the direct appeal, said that because no error prejudicial to the petitioner had been shown and because of the vigorously opposed contentions as to the local law on this question, no effort had been made to determine whether petitioner or respondent was correct on that point. We make this observation with respect to this issue in order that the court may understand how it appears in the case.

### *Conclusion.*

This brief is not on the merits but is designed to show why it is not proper to grant the order of review. The basic charge of negligence leveled against respondent in this case was of such gravity that a jury that would convict Mr. Brieth of having set this machinery in motion, knowing as he did where Mr. Mobley was, would have also found him guilty of the criminal charge of mayhem. Petitioner asserts that because Mr. Brieth was the person nearest the controls at the time the machinery began operating, and because the machinery would not have started without the intervention of some human agency, that Mr. Brieth's direct and positive statements that he did not operate the controls and thus set the machinery in operation, were so

inherently improbable and unbelievable as to make the jury's verdict contrary to reason. We assert with a great deal more emphasis that for the jury to have believed that Mr. Brieth did operate the controls and set this machinery in operation under the given facts and circumstances would have been far more unreasonable and improbable. This law suit was filed after the statute of limitation had run against it. It was based upon charges of the gravest acts of negligence imaginable. Petitioner failed utterly to produce an eye witness to the incident. The jury refused to believe the two witnesses who testified that Mr. Brieth confessed to them that he was responsible for Mr. Mobley's injuries. Other reasons were advanced before the jury for the engaging of the machinery and its setting in motion which were equally or more probable than the charge that Mr. Brieth deliberately operated the controls. Mr. Williford, the driller, who testified to Mr. Brieth's confession of responsibility, was the last admitted operator of the controls. He had a personal interest in excusing himself of any blame and of attaching it to someone else. Another fact to be considered is that the machinery was not operating because of the malfunctioning of the low drum clutch for a lack of grease. As testified by Mr. Mobley, and corroborated by Mr. Brieth, the instant grease was applied to this machinery it set in operation. Therefore, the jury was fully justified in finding that Mr. Brieth did not set the machinery in motion and in believing that the machinery was set in motion from other causes equally or more probable than Mr. Brieth's act.

It is respectfully suggested that there is no merit to the petition for writ of certiorari and that the case pre-

sented does not fall within known rule that calls for the affirmative exercise of the court's discretion, and the petition should be denied.

Respectfully submitted,

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